

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

<b>STATE OF WASHINGTON,</b>	)	<b>No. 27071-8-III</b>
	)	
<b>Respondent,</b>	)	
	)	
<b>v.</b>	)	<b>Division Three</b>
	)	
<b>HAJDAR IBERHYSAJ,</b>	)	
	)	
<b>Appellant.</b>	)	<b>UNPUBLISHED OPINION</b>

Korsmo, J. — Hajdar Iberhysaj challenges his Benton County conviction for second degree burglary, alleging that his counsel was ineffective by not demanding a CrR 3.5 hearing concerning statements Mr. Iberhysaj allegedly made to some friends. His contention is without merit and, accordingly, we affirm the conviction.

**FACTS**

The Hastings store in Richland was burglarized in the early morning hours of October 29, 2006. The security tape that captured the incident was of such poor quality that the actors could not be identified.

Detective Robert Benson reviewed tapes of telephone conversations made by Mr.

Iberhysaj while he was in the Kennewick jail. In one of those conversations, Mr. Iberhysaj told Ramon and Pavel Busev that he and another man had been inside the Hastings store. One of the Busevs reminded Mr. Iberhysaj that the conversation was being recorded, but he ignored the warning.

The detective then visited Mr. Iberhysaj in jail and had a conversation with him. The detective recognized Mr. Iberhysaj's voice from the recording. Mr. Iberhysaj confirmed that he knew the Busevs and their telephone number. He denied involvement in the Hastings burglary.

The charge of second degree burglary was later filed and the matter ultimately proceeded to jury trial. No CrR 3.5 hearing was held. The tape was admitted at trial, along with Detective Benson's testimony concerning his conversation with Mr. Iberhysaj. The jury convicted Mr. Iberhysaj as charged.

The trial court imposed a nine month sentence and credited Mr. Iberhysaj with eleven months spent in custody at that time. He then appealed to this court.

### ANALYSIS

The sole issue we address is whether trial counsel was ineffective for failing to request a CrR 3.5 hearing.<sup>1</sup> Mr. Iberhysaj has not met the heavy burden of showing that

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<sup>1</sup> Mr. Iberhysaj also raises a claim that the trial court erred in not explaining on the judgment and sentence why partial confinement was not considered. The obvious answer is that the sentence had already been served. Since Mr. Iberhysaj has already served his

his counsel failed him to the point that he received an unfair trial.

The standards of review of a claim of ineffective assistance of counsel are well settled. The Sixth Amendment guarantees the right to counsel. More than the mere presence of an attorney is required. The attorney must perform to the standards of the profession. Counsel's failure to live up to those standards will require a new trial when the client has been prejudiced by counsel's failure. *State v. McFarland*, 127 Wn.2d 322, 334-335, 899 P.2d 1251 (1995). In evaluating ineffectiveness claims, courts must be highly deferential to counsel's decisions. A strategic or tactical decision is not a basis for finding error. *Strickland v. Washington*, 466 U.S. 668, 689-691, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). To prevail on a claim of ineffective assistance, the defendant must show both that his counsel erred and that the error was so significant, in light of the entire trial record, that it deprived him of a fair trial. *Id.* at 690-692.

CrR 3.5, entitled "Confession Procedure," establishes a pretrial process for admitting a defendant's statements at trial. While the rule broadly states that it governs the admission of "a statement of the accused," the rule actually applies only to custodial statements to law enforcement. *State v. McFarland*, 15 Wn. App. 220, 222, 548 P.2d 569, review denied, 87 Wn.2d 1006 (1976); *State v. Harris*, 14 Wn. App. 414, 420-422,

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sentence, we will not address the issue because it is moot. *In re Matter of Cross*, 99 Wn.2d 373, 376-377, 662 P.2d 828 (1983) (a case is moot if the court cannot provide effective relief). Remand for clarification is meaningless in these circumstances.

542 P.2d 122 (1975), *review denied*, 86 Wn.2d 1010 (1976). This more limited scope is not surprising since the purpose of CrR 3.5 is to implement the constitutional right to a voluntariness hearing for custodial statements. *See State v. Williams*, 137 Wn.2d 746, 750-751, 975 P.2d 963 (1999).

Mr. Iberhysaj contends his counsel was ineffective in not demanding a CrR 3.5 hearing before his statements were used at trial. The telephone recording of a conversation between Mr. Iberhysaj and his friends was not a custodial interrogation or other statement to a government official that fell within the scope of CrR 3.5. Counsel was not ineffective in this regard since there was no right to a hearing concerning that evidence.

Mr. Iberhysaj's statements to Detective Benson did fall within the scope of CrR 3.5. However, those statements were not particularly useful for the prosecution. Other than confirming that Mr. Iberhysaj knew the Busevs' telephone number, something that was already obvious from the telephone call itself, the remaining information was a denial of involvement in the burglary. Defense counsel had no reason to seek to suppress that information, particularly where it allowed the jury to hear Mr. Iberhysaj deny committing the crime without having to testify. By letting the statement in without a contest, it allowed the defendant to testify without risk of cross-examination.<sup>2</sup>

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<sup>2</sup> The defense rested without putting on any evidence.

It appears that there was a tactical reason to not contest the statements made to the detective. Appellant has not established that his counsel's performance was defective. He also has not established how he would have been harmed by putting forth his denial of involvement. Mr. Iberhysaj has failed to prove either error by his counsel or resulting harm. He needed to do both.

The conviction is affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Korsmo, J.

WE CONCUR:

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Schultheis, C.J.

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Sweeney, J.